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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a Postal Service regulation that prohibits soliciting the public from a walkway located on postal premises violates the First Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision and regulation involved	2
Statement	3
Reasons for granting the petition	7
Conclusion	17
Appendix A	1a
Appendix B	23a
Appendix C	31a

TABLE OF AUTHORITIES

Cases:

Adderley v. *Florida*, 385 U.S. 39 (1966)	8
Boos v. *Barry*, 108 S. Ct. 1157 (1988)	4
Cornelius v. *NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985)	6, 7, 8, 11, 13
Edwards v. *South Carolina*, 372 U.S. 229 (1963)	4
Greer v. *Spock*, 424 U.S. 828 (1976)	10
Heffron v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981)	8
Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1973)	10
Members of the City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984)	8
Monterey County Democratic Central Comm. v. *United States Postal Service*, 812 F.2d 1194 (9th Cir. 1987)	15
National Anti-Drug Coalition v. *Bolger*, 737 F.2d 717 (7th Cir. 1984)	15, 16
Perry Education Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)	9, 11, 12
United States v. *Belsky*, 799 F.2d 1485 (11th Cir. 1986)	13, 14
United States v. *Bjerke*, 796 F.2d 643 (3d Cir. 1986)	14, 15
United States v. *Grace*, 461 U.S. 171 (1983)	4, 6, 10, 11, 12
United States Postal Service v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981)	8, 10

Cases – Continued: Page

Village of Schaumburg v. *Citizens for a Better Environment*, 444 U.S. 620 (1980) 8

Constitution, statute and regulations:

U.S. Const. Amend. I 2, 4, 7, 8, 9, 10, 14, 15

18 U.S.C. 13 3

39 C.F.R.:

Section 232.1 2

Section 232.1(a) 2

Section 232.1(d) 3

Section 232.1(h) 2, 3, 4, 14

Section 232.6(h)(2) (1974) 11

Miscellaneous:

38 Fed. Reg. 27,824-27,825 (1973) 11

43 Fed. Reg. 38,824 (1978) 15

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 866 F.2d 699. The memorandum and order of the district court (App., *infra*, 23a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1989, and a petition for rehearing was denied on April 14, 1989 (App., *infra*, 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The First Amendment to the Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

39 C.F.R. 232.1 provides, in pertinent part:

> (a) *Applicability.* This section applies to all real property under the charge and control of the Postal Service, to all tenant agencies, and to all persons entering in or on such property. This section shall be posted and kept posted at a conspicuous place on all such property.
>
> * * * * *
>
> (h) *Soliciting, electioneering, collecting debts, vending, and advertising.* (1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited. This prohibition does not apply to:
>
> (i) Commercial activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act;
>
> (ii) Posting notices on bulletin boards as authorized in § 243.2(a) of this chapter;
>
> (iii) The solicitation of Postal Service and other Federal military and civilian personnel for contributions by recognized agencies as authorized by the Manual on Fund Raising Within the Federal Service, issued by the Chairman of the U.S. Civil Service Commission under Executive Order 10927 of March 13, 1961.

STATEMENT

Following a trial before a United States Magistrate in the District of Maryland, respondents were convicted of soliciting contributions on postal premises, in violation of 39 C.F.R. 232.1(h); refusing to comply with directions to leave postal property, in violation of 39 C.F.R. 232.1(d); and trespassing on postal property, in violation of 18 U.S.C. 13, incorporating Maryland state law. Respondent Kokinda was fined $50 and sentenced to ten days' imprisonment. Respondent Pearl was fined $100 and received a suspended sentence of 30 days' imprisonment.

1. Respondents are members of the National Democratic Policy Committee, a political advocacy group. On August 6, 1986, they set up a card table near the entrance to a post office in Bowie, Maryland. For several hours, they solicited contributions for their organization, distributed literature, and sold subscriptions to the organization's newspaper. The table partially blocked a concrete walkway that ran along the edge of the post office building. The walkway was entirely on Postal Service property, and it was at all points more than 75 feet from a public sidewalk and street. App., *infra,* 2a-3a, 12a, 15a.[1]

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[1] The district court described the geography of the Bowie post office as follows (App., *infra,* 24a):

> [T]he Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose.

After receiving between 40 and 50 complaints from postal patrons about respondents' activities, the Bowie Postmaster and a postal inspector called respondents' attention to a Postal Service regulation prohibiting "soliciting and vending" on Postal Service grounds and asked respondents to leave. When respondents refused to do so, they were arrested. App., *infra,* 3a, 13a.

2. After being convicted at a trial before a magistrate, respondents appealed their convictions to the district court. They argued, *inter alia,* that the prohibition against solicitation on the post office walkway violated the First Amendment to the Constitution. The district court affirmed respondents' convictions. App., *infra,* 23a-30a. With respect to respondents' argument regarding the constitutionality of the Postal Service's no-solicitation rule, the district court ruled that the Bowie post office walkway was not a public forum and that the prohibition against soliciting in that location was a reasonable and valid restriction under the First Amendment. *Id.* at 27a-28a.

3. A divided panel of the court of appeals reversed, holding that the no-solicitation regulation, 39 C.F.R. 232.1(h), violated respondents' First Amendment rights. App., *infra,* 1a-22a. The court observed that the solicitation conducted by respondents was a form of protected political speech (*id.* at 5a-6a), and that the walkway in front of the Bowie post office was a "public forum" (*id.* at 6a). As a general matter, the court held, sidewalks "are presumptively public forums" (*id.* at 4a). Citing *Boos* v. *Barry,* 108 S. Ct. 1157, 1161 (1988); *Edwards* v. *South Carolina,* 372 U.S. 229, 235 (1963); and *United States* v. *Grace,* 461 U.S. 171, 173 (1983), the court stated that "[t]he walkways in front of the Bowie post office, like those surrounding foreign embassies, * * * the Supreme Court, * * * or state capital grounds" serve the primary function of accommodating pedestrian traffic, but they

"may * * * accommodate other uses simultaneously, including use as a forum for the peaceful expression of political views." App., *infra,* 6a. The Court acknowledged that other courts of appeals have held similar post office walkways to be nonpublic forums, but the court criticized those decisions as drawing overly fine distinctions among types of sidewalks. *Ibid.*

The fact that the post office walkway was located on Postal Service property, that it was some distance from the street, and that it was dedicated to post office use was not sufficient, the court held, to deprive the walkway of its character as a public forum. App., *infra,* 7a. Accordingly, the court concluded, respondents' activities could not be excluded except by content-neutral time, place, and manner regulations that furthered a "significant government interest" and were "narrowly tailored" to "leave open alternative channels of communication." *Id.* at 8a (citations omitted).

Because the no-solicitation regulation prohibited "an entire category of expression" (App., *infra,* 9a), the court of appeals concluded that it was "neither a reasonable manner restriction nor * * * narrowly drawn to accomplish a significant government interest" (*id.* at 8a-9a). Moreover, the court found no evidence that the ban on solicitation served important purposes. The court found that the record indicated "at most, minor inconvenience to postal patrons" (*id.* at 12a),[2] and it suggested that the

[2] The court denied that the government had a valid interest in minimizing the disruption caused by "forty to fifty" customer complaints received by postal employees in response to respondents' activities. The court noted that "the complaints may have been generated by the hearers' disagreement with the message of the National Democratic Policy Committee," and concluded that limitations on respondents' rights of expression could not be imposed to "protect[ ] * * * the sensibilities of those who would object to the speech." App., *infra,* 13a.

disruption caused by solicitation on the walkways could be minimized by other means that would have a less restrictive impact on speech (*ibid.*).

Judge Widener dissented (App., *infra,* 15a-22a). While recognizing that "certain non-commercial solicitation is protected speech," Judge Widener noted that that "merely begins the inquiry," since " '[e]ven protected speech is not equally permissible in all places at all times.' " *Id.* at 16a (quoting *Cornelius* v. *NAACP Legal Defense & Educational Fund,* 473 U.S. 788, 799 (1985)).

Judge Widener disagreed with the majority's conclusion that the post office walkway should be classified as a "public forum," and he rejected the "premise advanced by the majority * * * that all sidewalks, wherever located, are fungible and are public forums." App., *infra,* 18a. "Identifying a portion of government property as a sidewalk does not end the inquiry," Judge Widener explained. "Rather, the relevant authorities require us to determine whether these sidewalks are public, by tradition or by designation, or nonpublic." *Id.* at 18a-19a. In Judge Widener's view, the access walkway under consideration could not be compared to "the municipal sidewalk which forms the street front boundary of this postal property" (*id.* at 19a), nor to the municipal sidewalk "forming a part of the perimeter" of the Supreme Court, which the Court in *United States* v. *Grace,* 461 U.S. 171 (1983), found to be "indistinguishable from any other sidewalks in Washington D.C." App., *infra,* 18a. Unlike the sidewalk in *Grace,* the postal walkway did not "define the government property or form the perimeters thereof," but was located some distance from the public sidewalk running along the street and "serve[d] only one function, i.e., for access to the post office in furtherance of postal business." *Id.* at 19a.

Judge Widener also concluded that the Postal Service had not converted the walkway into a public forum by

permitting it to be used for expressive activity other than solicitation. He explained that the government " 'does not create a public forum . . . by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.' " App., *infra,* 20a (quoting *Cornelius,* 473 U.S. at 802). Because solicitation is more disruptive than the simple distribution of literature, Judge Widener concluded that the ban on solicitation was reasonable "in light of the purpose the property is intended to serve." App., *infra,* 20a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that walkways located entirely within postal premises and designed solely to provide access to postal buildings are public forums, indistinguishable from ordinary municipal sidewalks. The court therefore ruled that those walkways must be held open to the public for the conduct of fundraising activities subject only to reasonable time, place, and manner restrictions. Three other courts of appeals have held that similar postal walkways do not constitute public forums and have, accordingly, upheld the Postal Service's total ban on solicitation as it applies to such walkways. The question of the validity of the Postal Service regulations governing conduct on post office premises is important to the day-to-day management of the nation's 35,000 post office facilities. Moreover, the status for First Amendment purposes of walkways located on the grounds of those buildings, and similar off-street walkways on public premises in general, presents an important constitutional issue that warrants review by this Court.

1. The court of appeals' holding is based on a misapplication of this Court's decisions dealing with public and nonpublic forums. Access walkways are found in some

form in a great many public buildings throughout the nation. Because those walkways funnel employees and patrons into the buildings they serve, they provide attractive stations for persons engaged in commercial or political activity who are seeking to attract the attention of a large number of people. For precisely the same reason, however, those walkways are subject to congestion; permitting solicitation at such locations can inconvenience patrons and interfere with the business being conducted in the building itself. For that reason, the question whether such walkways are public forums from which persons engaging in speech may not readily be excluded is an important one, not only for the Postal Service, but for the operators of public buildings generally.

The solicitation of funds for charitable or political causes has been recognized by this Court as a form of expressive activity protected by the First Amendment. See *Heffron* v. *International Society for Krishna Consciousness,* 452 U.S. 640, 647 (1981); *Village of Schaumburg* v. *Citizens for a Better Environment,* 444 U.S. 620, 632 (1980); *Cornelius* v. *NAACP Legal Defense & Educational Fund,* 473 U.S. 788, 797 (1985). The Court has acknowledged, however, that "the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government." *Members of the City Council* v. *Taxpayers for Vincent,* 466 U.S. 789, 814 (1984) (quoting *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 129 (1981)). "Nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption it might cause." *Cornelius,* 473 U.S. at 799-800; see also *Adderley* v. *Florida,* 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

The government's ability to restrict First Amendment activity on public property is determined by the character of the public property at issue, and the use to which it is dedicated. In *Perry Education Ass'n* v. *Perry Local Educators' Ass'n,* 460 U.S. 37 (1983), the Court identified three categories of public property for the purpose of First Amendment analysis: traditional public forums; property designated for use as a public forum; and "nonpublic forums." With respect to traditional or "quintessential" public forums, including streets, parks, and other areas that have been "by long tradition * * * devoted to assembly or debate" (460 U.S. at 45), content-based restrictions are permitted only if they are narrowly drawn to serve a compelling state interest. Content-neutral time, place, and manner regulations are also valid, but they must be "narrowly tailored to serve a significant government interest," and they must "leave open ample alternative channels of communication." *Ibid.* Similar standards apply to areas not traditionally dedicated to public expression but intentionally opened by the government for that purpose. With respect to property that is found to be a nonpublic forum, however, the government may impose any limitation on speech that is reasonable and that is not motivated by a desire to suppress the speaker's viewpoint. *Id.* at 46.

The court of appeals in this case was mistaken in identifying the access walkway surrounding the Bowie post office as a traditional public forum. Based on its general observation that "most sidewalks are designed as outdoor public thoroughfares" (App., *infra,* 6a) and are "a particularly public and therefore appealing forum" (*id.* at 7a), the court decided that no distinction could or should be drawn between off-street access walkways and ordinary

public sidewalks. But the fact that property bears a physical resemblance to a public sidewalk, is freely accessible to the public, provides a ready audience, or is conveniently "appealing," does not transform it into a forum suitable for unrestricted public assembly or debate. That approach would suggest that almost any horizontal strip of concrete located on publicly owned property would have to be considered a public forum. Yet, "[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *United States* v. *Grace*, 461 U.S. at 177. Nor does the convenience of a readily available audience confer public forum status on property that has been reserved for a special use. See *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 129; *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1973).

As Judge Widener observed, this Court did not decide, in *United States* v. *Grace*, 461 U.S. 171 (1983), or in any other case, that "all sidewalks, wherever located, are fungible * * * public forums." App., *infra*, 18a. In *Grace*, the Court struck down a regulation curtailing First Amendment activity on municipal sidewalks "comprising the outer boundaries of the Court grounds." 461 U.S. at 179. The Court observed that the sidewalks were neither physically nor functionally distinct "from any other sidewalks in Washington, D.C.," and the Court detected no "discern[ible] * * * reason why they should be treated any differently." *Ibid.* As the Court explained in *Grace*, its prior ruling in *Greer* v. *Spock*, 424 U.S. 828, 836 (1976), that military property "generally open to the public" need not be treated as a traditional public forum, was based on its analysis of both the geography and the function of the Fort Dix military base, and not, as the court of appeals suggested, solely on the unique status of property reserved

to the military. App., *infra*, 7a. The streets and sidewalks in *Greer* were "located within an enclosed military reservation * * * and were thus separated from the streets and sidewalks of any municipality." *Grace*, 461 U.S. at 179. By contrast, in *Grace* there was "no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks * * * that they have entered some special type of enclave." 461 U.S. at 180.

In this case, as in *Greer*, the walkway at issue—which is set back from the street and plainly dedicated to post office use—is readily distinguishable from an ordinary municipal sidewalk. It is evident to the most casual observer that the area is not a general public thoroughfare, but functions exclusively to carry customers the short distance between the post office parking lot and the post office building.[3] The court of appeals' concern (App., *infra*,

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[3] The magistrate specifically found that the post office walkway on which respondents were conducting their activity did not provide access to any other place of business and was "for the sole and exclusive purpose of ingress and egress" to and from the Bowie post office. C.A. App. 97.

The Postal Service has not transformed the walkway into a public forum by its previous practice of permitting certain groups to use postal facilities for fundraising, or by failing to prohibit other forms of expression. Since 1970, when the Postal Service was created, the use of postal facilities has been limited to designated groups and activities. Even before the current no-solicitation rule was promulgated in 1978, solicitation could be conducted only by non-profit organizations at the discretion of Postal Service officials and, after 1973, only if the activities did not "prevent, unduly impair, or interfere with the transaction of business or provision of postal services to the public." 39 C.F.R. 232.6(h)(2) (1974); see 38 Fed. Reg. 27,824-27,825 (1973). At no time have postal facilities been held open to all individuals or groups wishing to conduct solicitation. The "government does not create a public forum * * * by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 47.

6a) that citizens will be "left to wonder" what forms of expression are permitted in this area no more justifies the invalidation of the Postal Service regulation than it would support a different result in *Greer*.

If, as we believe, post office walkways are nonpublic forums, then the Postal Service's prohibition on solicitation is clearly valid. The prohibition does not pick and choose among speakers on the basis of point of view or subject matter, and thus is content-neutral. The regulation is also "reasonable in light of the use to which the building and grounds are dedicated." *Grace*, 461 U.S. at 178; *Perry*, 460 U.S. at 49. The no-solicitation regulation advances the government's interest by providing postal patrons with easy access to the premises, by shielding patrons from the kind of interference that is commonly associated with solicitation, and by avoiding any suggestion that the Postal Service or the United States government supports the organization that is soliciting on the post office grounds.

While less restrictive measures might be devised to serve many of the same purposes, that does not undermine the reasonableness of the Postal Service's categorical prohibition of solicitation. And the fact that postal service walkways might possibly "accommodate other uses" (App., *infra*, 6a) does not invalidate the government's decision to exclude some activities altogether. In upholding the categorical exclusion of organizations from participation in a government sponsored fund drive, this Court pointed out that a restriction on expression in a forum created for a defined purpose

> need only be *reasonable*, it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated. * * * Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling.

Cornelius, 473 U.S. at 808-809.

2. Although the Postal Service's regulation restricting activities on post office premises has been the subject of decisions by five courts of appeals, the court in this case is the first to strike down the regulation. The Third, Ninth, and Eleventh Circuits have all agreed that postal service walkways similar to the one at issue in this case do not qualify as traditional public forums and therefore do not have to be made available to the public for activities such as the solicitation of contributions and the sale of newspaper subscriptions. The cases in the Third and Eleventh Circuits, in particular, involved facts almost identical to the facts in this case and yet squarely rejected the "public forum" analysis on which the decision in this case rests. The Seventh Circuit has also upheld the Postal Service's no-solicitation rule, although on a different theory.

In *United States* v. *Belsky*, 799 F.2d 1485 (11th Cir. 1986), members of the National Democratic Policy Committee challenged their convictions for engaging in solicitation on an off-street post office walkway. The Eleventh Circuit concluded that "under applicable Supreme Court precedent, the ingress and egress walkways to the post office buildings are a nonpublic forum," and are therefore "distinguishable from the public sidewalks surrounding the buildings, which remain open for expressive conduct." 799 F.2d at 1489. The court held that the regulation was reasonable in light of the purpose the walkways were intended to serve; the court accepted the government's contention that solicitation causes congestion, disrupts the flow of traffic, and otherwise "impede[s] the use of the

properties for their intended purpose." *Ibid.* The court also held that the "distinction drawn by the regulation between the distribution of literature and the solicitation of funds" was justified by the "inherently more intrusive and complicated" character of solicitation. *Ibid.* The court noted that the ban on solicitation was made more acceptable by the fact that the regulatory scheme left open "alternate channels" for communication—solicitation on near-by municipal sidewalks, and distribution and public discussion on postal premises. *Id.* at 1489 n.9. Finally, the court recognized the government's need to manage a "multitude of postal facilities throughout the country" by means of "a uniform blanket prohibition" as opposed to an approach requiring each individual postal site to police non-postal activities on the premises. *Id.* at 1490.

In *United States* v. *Bjerke*, 796 F.2d 643 (3d Cir. 1986), members of the National Democratic Policy Committee once again sought review, on First Amendment grounds, of their convictions under Section 232.1(h) for unlawful solicitation on off-street post office walkways. The Third Circuit rejected their challenge on the ground that the walkways abutting the post office, which were located "a good distance removed from the street, [and] could not be confused with municipal sidewalks" (796 F.2d at 649), were not traditional public forums "dedicated to serve the traditional functions of streets or parks." Rather, the court explained, the walkways in question were designed for "the particular function of accommodating post office patrons on official business." *Ibid.* Noting that this Court "has directed repeatedly and emphatically that governments must be permitted reasonable control over such nontraditional public forums" (*ibid.*), the court of appeals stated that "the only question here is whether the regulation of the nonpublic forum reasonably advances the governmental interest" (*id.* at 650). The court observed that the decision to "single[ ] out solicitation for regulation" was reasonable because " '[t]he solicitation of alms and contributions is an inherently more aggressive form of conduct, and more likely to hinder the orderly transaction of postal business, than is the expression of ideas.' " *Id.* at 651 (quoting 43 Fed. Reg. 38,824 (1978)). The fact that "alternative areas are nearby and available" for communication, and that the distribution of literature on postal premises was unregulated, "enhance[d the] reasonableness" of the regulation at issue. 796 F.2d at 650. The court therefore concluded that, "as applied in this case the regulation withstands First Amendment scrutiny." *Id.* at 651.

The Ninth Circuit has likewise upheld the Postal Service's right to restrict First Amendment activities on post office premises. See *Monterey County Democratic Central Comm.* v. *United States Postal Service*, 812 F.2d 1194 (1987). The court of appeals in that case considered the First Amendment status of an off-street post office walkway in the context of a challenge by a Democratic Party Committee to a Postal Service guideline permitting voter registration solely by non-partisan groups. The court concluded that the walkway was not a traditional public forum and had not become a public forum by designation. Finding that "[t]he Postal Service reasonably could conclude that its freedom from the appearance of involvement in the political process is critical to its ability to carry out its charge" (812 F.2d at 1199), the court upheld the Service's decision to bar plaintiff's voter registration activity from the walkway.

Finally, in *National Anti-Drug Coalition* v. *Bolger*, 737 F.2d 717 (1984), the Seventh Circuit also upheld the constitutionality of the Postal Service's no-solicitation rule, although on a different constitutional theory. Because the record was insufficient to permit the court to determine whether the post office walkways at issue were geographically distinguishable from municipal sidewalks, the court

declined to reach the question whether the walkways were public forums. The Court held, however, that "even if * * * postal property constitutes a public forum, the prohibition on solicitation set forth in [the Postal Service regulation] would be a reasonable 'manner' type of restriction on the exercise of free speech, and thus not in violation of the First Amendment." 737 F.2d at 723.

3. The conflict among the circuits is as clear-cut as it could be. In each case, persons seeking to engage in political solicitation sought to use a post office walkway for their activities, contrary to the Postal Service's regulations. In the Third, Seventh, Ninth, and Eleventh Circuits, the courts upheld the regulation. In the present case, the Fourth Circuit struck it down. Because the constitutional issue presented has substantial practical significance, and because the courts of appeals are sharply divided on the issue, this Court should grant review.

The conflict among the circuits, if left unresolved, would disrupt the Postal Service's efforts to fashion simple, nationwide rules governing the operation of postal facilities. Short of drafting new regulations specifically for post office buildings located in the Fourth Circuit, the Postal Service would have two unattractive choices if this Court does not grant review. Either it would have to redraft its no-solicitation rule according to the Fourth Circuit's analysis—even though the Fourth Circuit is the only court to have struck down the current regulation—or it would have to abandon any effort to enforce its no-solicitation rule in the States comprising the Fourth Circuit. Accordingly, unless and until this Court grants review, the Postal Service will not be able to enforce a single nationwide standard to deal with the problem of solicitation and other forms of speech on the grounds of the 35,000 post office facilities around the country. The practical difficulties created by a lack of uniformity on this constitutional issue therefore further strengthen the case for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1989

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-5107

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

MARSHA B. KOKINDA AND
KEVIN E. PEARL, DEFENDANTS-APPELLANTS

CHRISTIAN ADVOCATES SERVING EVANGELISM; PROJECT FOR PUBLIC SPACES, INC., AMICUS CURIAE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

Argued: March 7, 1988
Decided: January 31, 1989

Before: WIDENER, MURNAGHAN, and WILKINSON, Circuit Judges.

WILKINSON, Circuit Judge:

Marsha Kokinda and Kevin Pearl appeal their convictions for soliciting contributions on the sidewalk in front of the Bowie, Maryland post office in violation of postal

service regulation 39 C.F.R. § 232.1(h) (1986). Because we believe that the post office sidewalk constitutes a public forum and that the postal regulation is neither a reasonable manner restriction nor narrowly tailored to protect First Amendment values, we hold 39 C.F.R. § 232.1(h) an unconstitutional infringement upon defendants' rights. No significant government interest has been demonstrated that would be narrowly accommodated by eliminating an entire category of political speech from this public forum. The convictions of these defendants are therefore reversed.

I.

Marsha Kokinda and Kevin Pearl are volunteers for the National Democratic Policy Committee. On August 6, 1986, they set up a table on the sidewalk in front of the Bowie, Maryland post office. There they solicited contributions and distributed literature addressing a variety of political issues.

During the course of the day, Kokinda and Pearl attempted to speak with post office patrons. They distributed National Democratic Policy Committee literature, solicited contributions to their political organization, and solicited subscriptions to its newspaper, New Solidarity. They placed posters around the table and set their literature on top of it. The literature included pamphlets, books, and magazines discussuing such issues as the "AIDS cover-up" and the testing of "Congress for Cocaine."

The sidewalk on which appellants set up their table is approximately seven feet wide and is located on postal service property. The sidewalk runs in front of the Bowie post office and postal patrons must use this walkway to enter the building. A post office parking lot is contiguous

to the sidewalk and both the parking lot and post office building itself are set back from a public road. A municipal sidewalk abuts the public road, runs in front of the parking lot, and is parallel to the post office sidewalk.

After seeing defendants' table and their literature and receiving complaints from postal customers, Postmaster Larry Poe of the Bowie post office asked Kokinda and Pearl to leave postal property. When they refused, the Postmaster returned with Postal Inspector Julius Cochran. Defendants again refused to leave and were arrested; their table and its contents were seized.

Kokinda and Pearl were charged with solicitation of contributions on postal service property, 39 C.F.R. § 232.1(h); refusal to comply with the lawful directions of postal authorities to leave postal service property, 39 C.F.R. § 232.1(d); and refusal to leave the grounds of a public building, Md. Code Ann. Art. 27, § 577(A) (1987) and 18 U.S.C. §§ 7 & 13. Appellants were convicted on the first two counts before a magistrate. Kokinda received ten days imprisonment and a $50.00 fine; Pearl thirty days and a $100.00 fine. Pearl's sentence was suspended and he was placed on nine months probation. Appellants appealed their convictions to the United States District Court for the District of Maryland. There they challenged, *inter alia*, the constitutionality of the federal regulation prohibiting solicitation on postal service property. This regulation provides in relevant part:

> Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises is prohibited.

39 C.F.R. § 232.1(h) (1986). The district court rejected the First Amendment challenge to the regulation and affirmed the convictions. Kokinda and Pearl appeal.

II.

Nearly a half century ago, Justice Roberts, writing in *Hague v. C.I.O.*, 307 U.S. 496 (1939) (opinion of Roberts, J.), recognized the venerable role that public streets and parks had come to play in the dissemination of ideas.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16.

Sidewalks too are presumptively public forums. The peaceful expression of protest on the streets and sidewalks of this country have effectively brought issues of social import to public attention. The sidewalks have hosted groups which were pro-life and pro-choice, sloganeers on Contra aid and South African apartheid, and those who would bring the issues of drug abuse or POW's, acid rain or SDI into public view. What the debate has lacked in decorum, it has supplied in vitality, and it is important to the dialogue of a democratic system. Without the streets and sidewalks, there might have been no civil rights movement, and it is no coincidence that the expressions of that

era focused upon public buildings where the spectacle of official lawlessness was most in evidence. The First Amendment precedent of that time reflects the number, variety, visibility, and effectiveness of those demonstrations and the protection to which sidewalk speech is entitled. *See, e.g., Edwards v. South Carolina,* 372 U.S. 229 (1963) (civil rights march and demonstration by 187 black students on state house grounds); *Cox v. Louisiana,* 379 U.S. 536 (1965) (march by 2,000 black students on public sidewalks to courthouse and demonstration on sidewalk opposite courthouse); *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969) (march by 52 black citizens on public sidewalks to protest denials of civil rights); *Police Dep't of Chicago v. Mosley,* 408 U.S. 92 (1972) (peaceful picketing to protest race discrimination on sidewalk adjoining school).

This case, of course, is a far cry from those of the 1960's. It presents a calmer time, a less disadvantaged class of defendants, more reasonable actions on the part of those in authority, and a public edifice of little symbolic import. Yet there remains a price to be paid for declaring sidewalks off bounds to political solicitation and speech. Today the sidewalk may harbor the religious dissenter, the cultural iconoclast, the political maverick; tomorrow it may stage a movement of social protest whose message no one can foresee. Thus, sidewalks should remain available for speakers whose access to the public's ear and purse-string would otherwise be incomplete.

Kokinda and Pearl solicited subscriptions to the National Democratic Policy Committee's newspaper, New Solidarity. They also had available literature warning of an economic "blow out," calling for an end to the "AIDS cover-up," and discussing the problems of drug abuse in government. Theirs was classic political speech pursued peacefully in a place that "traditionally ha[s] been held

open to the public for expressive activities and [is] clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *United States v. Grace,* 461 U.S. 171, 179 (1983); *see Boos v. Barry,* 108 S.Ct. 1157, 1162 (1988).

III.

Whatever the general properties of sidewalks, the government contends that this particular sidewalk is not a public forum. We do not find its characterization of this sidewalk persuasive.

The walkways in front of the Bowie post office, like those surrounding foreign embassies, *Boos,* 108 S.Ct. at 1161; the Supreme Court, *Grace,* 461 U.S. at 173; or state capital grounds, *Edwards,* 372 U.S. at 235; serve the primary function of safely accommodating pedestrian traffic. These sidewalks may, however, accommodate other uses simultaneously, including use as a forum for the peaceful expression of political views. *See* Cass, *First Amendment Access to Government Facilities,* 65 Va. L. Rev. 1287, 1338-39 (1979). It ill behooves us to undertake too intricate a task of designation, holding this sidewalk public and that one not. We recognize that other circuit courts have held that non-municipal post office sidewalks do not constitute public fora. *Monterey County Democratic Central Committee v. United States,* 812 F.2d 1194 (9th Cir. 1987); *United States v. Belsky,* 799 F.2d 1485 (11th Cir. 1986); *United States v. Bjerke,* 796 F.2d 643 (3d Cir. 1986). But such labeling loses sight of the fact that most sidewalks are designed as outdoor public thoroughfares and that citizens should not be left to wonder at which ones they will be permitted to speak and which ones not.

First Amendment activities, conducted on busy pedestrian walkways such as this one, may cause some inconvenience to the flow of traffic. It is, however, the volume of traffic that makes sidewalks a particularly public and therefore appealing forum for public discourse. Surely congestion and inconvenience are not the end of the matter. The First Amendment requires that society tolerate some inconvenience in public forums to protect the values of free expression. If expressive activities were limited to the corners of parks where no one goes, there would be no public forum doctrine.

A municipal sidewalk runs along the street on which the Bowie post office is located. The government agrees that the municipal sidewalk is a public forum, though it is hardly a viable alternative forum, since passing motorcars are not an inviting audience for speech or solicitation. The government contends that the municipal sidewalk and the post office sidewalk are distinguishable since the latter is set back from the street, designated government property, and dedicated to post office use. But the fact that the walkway at issue here happens to be located on property owned by the federal postal service does not alone change its public forum character.

Absent from the post office sidewalk is the special need for security and discipline associated with the confines of a military reservation, *Greer v. Spock,* 424 U.S. 828, 838 (1976); the curtilage of a jail, *Adderly v. Florida,* 385 U.S. 39, 41 (1966); or the parking lot of a school, *Grattan v. Board of School Comm'rs of Baltimore City,* 805 F.2d 1160, 1163 (4th Cir. 1986). "[T]he government [may not] transform the character of [public forum] property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *Grace,* 461 U.S. at 180. Nor can a public forum be eliminated by the expedient of placing a parking lot between it and the public street. *See National Socialist White People's Party v. Ringers,* 473 F.2d 1010, 1015 (4th Cir.

1973) (en banc). If "the mere presence of a parking area between the street and a sidewalk limits our scrutiny of speech related regulations to the standard for nonpublic fora, we issue an open invitation for government architects and landscapers to surround public buildings with modern-day moats." *Bjerke,* 796 F.2d at 654-55 (Higginbotham, J., dissenting). The First Amendment is not consigned to the mercies of architectural chicanery, nor may a federal agency, simply by designating a sidewalk its own, spare itself the inconvenience of political protest and speech. *See United States Postal Service v. Greenburgh Civic Ass'ns,* 453 U.S. 114, 133 (1981).

IV.

Time, place, and manner restrictions are the means whereby the balance between expressive activity and public convenience is struck. In striking this balance, the fact that communication is involved weighs heavily. *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972); *Schneider v. State,* 308 U.S. 147, 160-61 (1939); Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. Rev. 1, 16-18. To further a "significant government interest" the state may, in a public forum, enforce content neutral regulations of the time, place, and manner of speech. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983); *Grace,* 461 U.S. at 177. Even content neutral regulations of the time, place, and manner of expression must be narrowly tailored, however, and must leave open alternative channels of communication. *See Frisby v. Schultz,* 108 S. Ct. 2495, 2500 (1988) (*citing Perry* 460 U.S. at 45). Insofar as 39 C.F.R. § 232.1(h) bans all solicitation from post office sidewalks, it offends the First Amendment for it is neither a reasonable manner restriction nor is it narrowly drawn to accomplish a significant government interest.

Solicitation, like leafletting, is an expressive activity and, as such, is within the protection of the First Amendment. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,* 473 U.S. 788, 797-99 (1985); *Heffron v. International Soc'y for Krishna Consciousness,* 452 U.S. 640, 647 (1981); *Village of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 632 (1980). Furthermore, we are dealing here with political and not commercial speech. The National Democratic Policy Committee seeks to inform the public of its views on a variety of political, social, and cultural issues. The effective dissemination of such views may be costly. Therefore, "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and . . . without solicitation the flow of such information and advocacy would likely cease." *Schaumburg,* 444 U.S. at 632.

The ban on solicitation here does not constitute a reasonable manner restriction. The Supreme Court has in fact warned that regulations prohibiting an entire category of expression will often fail to withstand constitutional scrutiny. *See, e.g., Grace,* 461 U.S. at 182-83 (total ban on display of "flags, banners, or devices" on sidewalk around Supreme Court not justified to preserve decorum and appearance of independence of Court); *Schaumburg,* 444 U.S. at 637 ("measures less intrusive than a direct prohibition on solicitation" can be instituted to prevent fraudulent misrepresentation by solicitors); *Schneider,* 308 U.S. at 162 (absolute prohibition on distribution of literature on public streets not justified to prevent littering). In contrast, regulations that limit a particular type of communication to accommodate both the speech and a signifi-

cant government interest have been upheld. *See, e.g., Frisby,* 108 S. Ct. at 2500-01 (prohibiting picketing in front of a single residence, but not general marching through a residential neighborhood); *Heffron,* 452 U.S. 640 (requiring solicitation on fairgrounds to be conducted from booths to ensure orderly movement of crowd); *Grayned,* 408 U.S. 104 (prohibiting only those demonstrations that disrupt normal school activities); *Kovacs v. Cooper,* 336 U.S. 77 (1949) (prohibiting only those "sound trucks" that emit "loud and raucous noises").

The critical distinction for First Amendment purposes is not between leafletting and solicitation, but between political expression which is disruptive and that which is not. We cannot accept the government's apparent premise that all outdoor solicitation, no matter when or how conducted, is disruptive speech. The Postal Service may certainly regulate the time, place, and manner of solicitation on postal sidewalks to minimize interference with access to the post office and to avoid undue disruption of post office business. Such time, place, or manner regulations may include, for example, restrictions on the size of tables, the number of individuals who may solicit at one time, the placement of tables, and the use of parking spaces by nonpostal customers. Such restrictions may take into consideration the needs and features of the particular facility. Speakers might be required to stand a certain distance from the doors or from the sidewalk curb or even to curtail their activities in hours of peak traffic. The absolute ban on solicitation, however, sweeps too broadly.

The Postal Service argues that the prohibition against soliciting alms or contributions on postal premises is "necessary to prevent disruptions and hindrances to the conduct of postal business." The absolute prohibition is considered "preferable to any attempt to permit solicitation under regulation as to time, place, and manner,"

which would be difficult to enforce and administer in the "tens of thousands of post offices throughout the nation." 43 Fed. Reg. 38824 (1978) (codified at 39 C.F.R. § 232). While concerns of uniformity and administrative efficiency may be sufficient to ban general use of nonpublic forums such as letterboxes, such interests do not warrant the elimination of an entire category of speech from a public sidewalk. *Greenburgh Civic Ass'ns,* 453 U.S. at 132-33. It is, of course, true that solicitation will engender some customer complaints and consume, at least initially, some time of postmasters and postal inspectors. Yet such is the necessary consequence of much time, place, and manner regulation. Outright prohibition of a medium of expression will always prove the easier and more efficient course. Yet liberty itself is no efficient concept, and the rights of citizens and interests of government are best reconciled not by total bans but through finespun accommodations. That, at least, has been the historic premise of First Amendment balancing, of the requirement that government use the least drastic means of curtailing free expression, and of "time, place, and manner" as a mediating device.

V.

The record in this case reveals no evidence of a significant government interest best served by the ban on solicitation in a public forum. There is no evidence that Kokinda and Pearl's solicitation obstructed or impeded postal customers. Appellants were not charged with obstructing post office entrances, disturbing postal employees in the performance of their duties, or impeding the public in the transaction of postal business. *See* 39 C.F.R. § 232.1(e) (1986). There is nothing to suggest that they harassed, threatened, or physically detained unwilling listeners.

Moreover, an unwelcome message in a public place does not infringe the interest of privacy associated with the home and is generally subject to avoidance by those who do not wish to hear it. *See Frisby,* 108 S. Ct. at 2501-02; *Cohen v. California,* 403 U.S. 15, 21-22 (1971). The government's interest in preventing the obstruction or disruption of post office business or the harassment of postal patrons can be readily addressed by the less restrictive alternative of prohibiting directly such obstruction, disruption or harassment. Section 232.1(e) demonstrates the feasibility of drafting more narrowly tailored regulations. *See Boos,* 108 S.Ct. at 1166.[1]

The evidence suggests, at most, minor inconvenience to postal patrons. Appellants' table partially blocked the post office sidewalk. The postal inspector testified that he thought that a person would have to move to get past someone at the table without touching them. Janet Wyatt, a post office customer, testified that, to get past an individual standing at the table and an automobile bumper protruding onto the sidewalk, she had to step off the sidewalk. These inconveniences are not unique to solicitation; they would also attend the mere distribution of literature from a table on the sidewalk. They could be better avoided by regulating the size and placement of the tables than by the imposition of a ban.

Wyatt also testified that parking at the Bowie post office "is pretty much at a premium" and she "had to wait

[1] 39 C.F.R. § 232.1(e) provides:

> Disorderly conduct, or conduct which creates loud and unusual noise, or which obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to impede or disturb the public employees in the performance of their duties, or which otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on property, is prohibited.

for someone else to pull out in order to get a spot." Postmaster Poe testified that, on a prior occasion, he had asked two members of the same group, possibly appellants, to move their car from the parking lot. Again, the scarcity of parking is not a problem that a ban on solicitation is narrowly tailored to avoid. Regulations limiting parking to postal patrons for specified periods of peak traffic would appear to address the problem more directly.

There remain finally the complaints of annoyed postal patrons. Inspector Cochran testified that he was called to the Bowie post office because Kokinda and Pearl were "soliciting funds and annoying customers." The record reveals that postal employees received "forty to fifty" complaints concerning Pearl and Kokinda. Wyatt testified that, because she knew the Girl Scouts were not allowed to sell cookies on federal property, she asked a clerk if Kokinda and Pearl's activities were not also illegal. The record is completely silent as to the nature or focus of the other thirty-nine to forty-nine complaints. For all we know, the complaints may have been generated by the hearers' disagreement with the message of the National Democratic Policy Committee or their disapproval of the appearance or affiliation of the speakers.

The First Amendment protects the speaker and not the sensibilities of those who would object to the speech. Justice Black, writing in dissent in *Feiner v. New York,* 340 U.S. 315 (1951), recognized the importance of protecting unpopular, cantankerous speech:

> [I]f, in the name of preserving order, [the police] ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him. . . . [T]he crowd was restless but there is no showing of any attempt to quiet it; pedestrians were forced to

> walk into the street, but there was no effort to clear a path on the sidewalk; one person threatened to assault [the speaker] but the officers did nothing to discourage this when even a word might have sufficed. Their duty was to protect [the speaker's] right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak.

Id. at 326-27 (Black, J., dissenting).

The anti-solicitation regulation here, likewise, acts only to suppress speech. It prohibits all solicitation anywhere on postal service property. It sweeps an entire category of expressive activity off a public forum solely in the interest of administrative convenience. It does not attempt to limit nondisruptive solicitation to a time, place, and manner consistent with post office operations; and it does not require that evidence of disruption be shown.

No thought was given to accommodating these speakers, only to removing them. For the foregoing reasons, their judgments of conviction are

REVERSED.

WIDENER, Circuit Judge, dissenting:

The majority holds an internal postal walkway, some seventy-seven feet from a public sidewalk, to be a traditional public forum and in so doing strikes down 39 C.F.R. § 232.1(h) as unconstitutional. Our decision is contrary to every circuit which has decided the question, the Third, Ninth, and Eleventh Circuits. And the Seventh Circuit has reached the same result.[1] Because I believe that the walkway at issue is a nonpublic forum and that the challenged regulation is reasonable and viewpoint-neutral, I respectfully dissent.

The internal postal walkway at issue is at all points some seventy-seven feet from a public sidewalk and street. It is separated from the public way by a parking lot owned by the post office. The walkway is wholly on post office property and is used solely for pedestrian traffic between the post office parking lot and the post office. As in the Third Circuit, "[i]t is clear that the walkways at issue here bordering free-standing buildings a good distance removed from the street could not be confused with municipal sidewalks." *United States v. Bjerke*, 796 F.2d 643, 649 (3rd Cir. 1986).

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[1] Confronted with the exact issue, three other circuits have held that similar internal postal walkways are not traditional public forums and that the challenged postal regulations were reasonable and viewpoint neutral. *United States v. Bjerke*, 796 F.2d 643 (3rd Cir. 1986), *Monterey Cty. Dem. Cent. Comm. v. U.S. Postal Service*, 812 F.2d 1194 (9th Cir. 1987), *United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986).

The Seventh Circuit held the postal regulation struck down by the majority here was a reasonable manner restriction and therefore constitutional even if the walkway was a public forum, an issue the court declined to reach. *National Anti-Drug Coalition Inc. v. Bolger*, 737 F.2d 717 (7th Cir. 1984).

The postal regulation struck down by the majority forbids solicitation on postal property.[2] It is true that certain non-commercial solicitation is protected speech as illustrated by *Cornelius v. NAACP Legal Defense & Ed. Fund,* 473 U.S. 788 (1985), which held solicitation for the CFC, a federal employee charity drive, to be protected speech. That however merely begins the inquiry since "[e]ven protected speech is not equally permissible in all places at all times. Nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." 473 U.S. at 799-800. The First Amendment does not guarantee access to government property simply because the property is owned or controlled by the government. *Cornelius* at 803. The government has the power to preserve the property under its control for the use to which it is lawfully dedicated. For the purposes of determining when the government's interest in limiting the use of its property for its intended purpose outweighs other interests in its use, the Supreme Court has adopted a "forum analysis." The extent to which the government may control access depends upon the nature of the forum. *Cornelius* at 800; see also *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983).

In this circuit, we have previously applied the forum analysis required by *Perry* and cases following. In *Chapman v. Thomas,* 743 F.2d 1056 (4th Cir. 1984), cert.

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[2] The regulation, 39 C.F.R. § 232.1(h), provides in relevant part:

> (1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited.

denied, 471 U.S. 1004 (1985), we upheld North Carolina State University's ban of most, but not all, on-campus door to door solicitation. In so holding, we construed *Perry* and the application of the *Perry* standards against which to measure restraints placed upon First Amendment activity:

> The first category includes traditional public forums such as streets and parks "which by long tradition or government fiat have been devoted to assembly and debate" (citation omitted). The [government's] power to restrict first amendment activities in public forums is severely limited. . .
>
> Public property not in the first category that is, however, open to the public by the . . . [government] as a forum for expressive activity comprises the second category. Although the [government] . . . is not constitutionally required to open such facilities to the public, if it chooses to do so, the state then is bound by the same standards as apply in a traditional public forum. [Citations omitted] . . .
>
> The third category consists of public property which is neither a traditional nor designated public forum. These nonpublic forums are governed by different standards [citation omitted] . . . In *Perry,* the Court held that
>
> > Implicit in the concept of nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property . . . When government property is not dedicated to open communication the government may—

> without further justification—restrict use to those who participate in the forum's official business. (Citations omitted).

Chapman, supra, at 1058.

I cannot accept the premise advanced by the majority as the principal reliance for its decision that all sidewalks, wherever located, are fungible and are public forums. While it is true that in *United States v. Grace,* 461 U.S. 171 (1983), the Court held that a sidewalk forming a part of the perimeter of certain of the Supreme Court grounds was a public forum, the Court repeatedly stressed the fact that the perimeter sidewalks at issue were "indistinguishable from any other sidewalks in Washington, D.C." 461 U.S. at 179.[3] Identifying a portion of government property as a sidewalk does not end the inquiry. Rather, the relevant authorities require us to determine whether these sidewalks are public, by tradition or by designation, or nonpublic. The walkway at issue in this case does not define the government property or form the perimeters thereof, as did the sidewalks in *Grace.* The walkway in this case is distinguishable from the municipal sidewalk which forms the street front boundary of this postal property; indeed, it lies some 77 feet from the public sidewalk which runs along the street on which the post office is located. Had the government attempted to restrict First Amendment activity on that public sidewalk, we would have a different case, but that question is not before us. The district court found that the internal walkway in question serves only one function, i.e., for access to the post office in furtherance of postal business. Its dedication to that use is not challenged. The walkway in question here is entirely within postal property, serves the sole function of furthering official postal business, and is separated by a parking lot from the municipal sidewalk which does abut the government property. The internal postal walkway is not a traditional public forum within the meaning of that phrase as used in *Perry.* So, the walkway is not within *Perry's* first classification.

Similarly the government has not dedicated this walkway for First Amendment activity. The government did not create its walkway for purposes of providing a forum for expressive activity. Even had such activity occurred there, which is not this case, and even though it may be available for the limited communication of ideas, this walkway is not so automatically made into a public forum. See, e.g., *Cornelius,* 473 U.S. at 805; *U.S. Postal Service*

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[3] The Supreme Court expressly declined to rule on the First Amendment implications of restricting expressive activity within the Court grounds, choosing instead to limit its holding to perimeter sidewalks. The Court emphasized that these sidewalks were "public" because they were indistinguishable from traditional "public" sidewalks: "[t]he sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated differently." *Grace,* supra, at 179; "[t]here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." 461 U.S. at 180; "[t]hose sidewalks are used by the public like other public sidewalks. There is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or are in any way different from other public sidewalks in the city." 461 U.S. at 183.

In ~~*Grace,* the~~ Court did *not* establish that all sidewalks, except those in an enclosed and secured enclave, constitute traditional public forum property. The Court has rejected an attempt to dismiss the holdings of *Greer v. Spock,* 424 U.S. 828 (1976) (sidewalks within a military base are not public forums); *Adderley v. Florida,* 385 U.S. 39 (1966) and *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119 (1977) (jail and prison property are not public forums), as an exception to the analysis for "unusual forums" or enclosed and secure enclaves. *Perry,* 460 U.S. at p. 49, n.9.

v. Greenburgh Civic Assns., 453 U.S. at 130 n.6. The uncontroverted evidence establishes that the walkway was not made available for solicitation, and never has been so far as the record discloses. While defendants argue that the postal regulation does not prohibit the free distribution of literature, as we have noted, the "government does not create a public forum . . . by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius,* supra, at 802. Some ". . . selective access does not transform government property into a public forum." *Perry*, 460 U.S. at 47. Thus, the property does not fall within *Perry's* second classification.

This analysis leaves the inner walkway in question as a nonpublic forum and thus within *Perry's* third classification. The analysis next requires a determination of whether the restriction is reasonable and viewpoint-neutral. *Cornelius*, 473 U.S. at 806, 808. The ban on *all* solicitation is viewpoint neutral. The regulation is reasonable in light of the purpose the property is intended to serve. Permitting solicitation activities may reasonably be expected to interfere with access to the post office. While such solicitation as that at issue here is a form of protected speech, it is a more intrusive and complicated activity than would be the mere distribution of free literature. It causes greater disruption and confusion and is more time consuming. See *United States v. Belsky*, 799 F.2d 1485, 1489-90 (11th Cir. 1986).

As noted by the *Belsky* court:

> [s]uch activities could contribute to parking congestion, make access into the postal buildings difficult, and generally impede the use of the properties for their intended purpose, which is to provide postal services. If solicitation were permitted on postal

> grounds, it is unlikely that appellants' group would be the only organization to take advantage of it; the result could be considerable disruption of postal activities. 799 F.2d at 1489.

The regulation is reasonable, viewpoint-neutral, and designed to further the efficient rendering of postal services. It restricts access to a *nonpublic* forum, and so does not offend the First Amendment. *Cornelius*, 473 U.S. at 811, states well my conclusion: "[t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."

Finally, the fact that the regulation applies to all post offices, without regulatory language providing for the nuances of each individual post office building or facility, does not render the regulation overbroad in the sense that it does not account for variations in individual post offices. In the words of the Supreme Court:

> If Congress and the Postal Service are to operate as efficiently as possible a system for the delivery of mail which serves a Nation extending from the Atlantic Ocean to the Pacific Ocean, from the Canadian boundary on the north to the Mexican boundary on the south, it must obviously adopt regulations of general character having uniform applicability throughout the more than three million square miles which the United States embraces. In so doing, the Postal Service's authority to impose regulations cannot be made to depend on all of the variations of climate, population, density, and other factors that may vary significantly within a distance of less than 100 miles.

U.S. Postal Service v. Greenburgh Civil Assns., 453 U.S. at 133.

Neither is the regulation overbroad because it prevents *all* solicitaton. Indeed, that very fact insures viewpoint neutrality.

In sum, I would affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. JFM-87-083

MARSHA B. KOKINDA AND
KEVIN E. PEARL

v.

UNITED STATES OF AMERICA

[Filed June 23, 1987]

MEMORANDUM AND ORDER

Defendants appeal from their conviction by Magistrate James E. Kenkel on each of three charges filed against them: solicitation of contributions, in violation of 39 C.F.R. 232.1(h); refusal to comply with lawful directions to leave Postal Service property, in violation of 39 C.F.R. 232.1(d); and trespass upon Postal Service property, in violation of Maryland Code Ann., Article 27, Section 577 A, as assimilated under 18 U.S.C. Section 13. For the purpose of sentencing the Magistrate considered the trespass charge to be merged into the other two charges.

FACTS

The Government's statement of facts in its memorandum on appeal—which is not challenged by defendants—indicate [*sic*] that the evidence below proved is as follows:

The defendants were arrested at the United States Post Office in Bowie, Maryland, about 3:15 p.m. on August 6,

1986, on a day that the post office was open for business. According to testimony by Inspector Cochran and Postmaster Poe, the Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose.

Defendants set up a table on the sidewalk immediately adjacent to the building sometime during the morning of August 6. Testimony and photographs introduced showed that the table was approximately five or six feet from the main service entrance to the building. Defendants placed posters on the sides of the table, and set literature on top of it. The literature included pamphlets, books and magazines. During the course of the day, appellants stopped people walking into or out of the post office, trying to get their attention and to talk to them concerning the National Democratic Policy Committee.

Postmaster Poe testified that he was not at the post office in the morning, but discovered defendants' presence when he arrived at work at about 1 p.m. Upon arrival, he was told by the clerks that customers were complaining, and he personally listened to protests from the customers themselves about defendants' behavior. In response to the complaints, he stepped outside and asked defendants to leave the premises. Defendants told Mr. Poe that they did not have to leave, and they remained where they were. Mr. Poe then called the postal inspectors to the scene. The inspectors did not arrive until about 3 p.m. During the two-hour interim, Mr. Poe said, he received about "40 or 50" more complaints from customers.

Mr. Poe testified that he had been postmaster at Bowie since 1974. During that period, he had never given anyone permission to set up a table for any purpose on the post office sidewalk.

Janet Wyatt, a resident of Bowie, testified that she went to the post office between 11 a.m. and noon on August 6. She had to wait for a parking place to open up, as the post office was crowded and parking spaces were "pretty much at a premium." She noticed the defendants' table, and saw Mr. Pearl, one of the defendants, holding pamphlets and talking to people. Since defendants' table was blocking part of the sidewalk, Ms. Wyatt had to step off the curb to get by. She heard defendants offering to let people see their literature, although she was not personally solicited to buy a subscription. She said she was "surprised" to see the defendants, since she thought such solicitation was against the law. "We're not allowed to sell Girl Scout cookies there," she told the postal clerk when she registered her complant.

Inspector Cochran's testimony, brought out at the suppression/dismissal hearing, was that he and another inspector arrived at the post office shortly after 3 p.m. after being advised of the problem by Postmaster Poe. Inspector Cochran and his colleague waited and watched the defendants for about three to five minutes. The defendants were in the position described by Ms. Wyatt and Mr. Poe. As post office customers passed, defendants stopped them and tried to solicit them, according to the testimony of Mr. Cochran. Although he could not hear the entire conversations between the defendants and the people passing by, he could see the materials on the defendants' table,

and it appeared to him that the defendants were soliciting the postal patrons.

Satisfied that the appellants had no post office business to pursue, the postal inspectors went up to them, asked them to leave, and tried to give them a copy of "Poster 7," containing the postal service regulations. Ms. Kokinda, one of the defendants, told the inspectors that she did not need to look at the regulations, since she already knew them. Both Ms. Kokinda and Mr. Pearl refused to leave, and the inspectors told them that they would be charged with criminal violations. When the inspectors tried to get information from the two defendants to give them violation notices, Ms. Kokinda refuse to tell the inspectors her name. Mr. Pearl told them, "I think my name is Kevin Pearl." Neither defendant would voluntarily provide any identification. They were accordingly placed under arrest to be taken before a magistrate. Once in custody, they provided the officers with proof of their identities, and the magistrate released them on their personal recognizances.

When the defendants were arrested, the postal inspectors seized the table and the posters as well as the materials that were on the table. These items included several blank credit card slips, and one Visa charge form in the name of Joan Waldecker for a $25 charge for a six-month subscription to the National Democratic Policy Committee publication *New Solidarity*. There were also numerous completed forms in various names to contribute money to the national Democratic Policy Committee or to subscribe to *New Solidarity*, and an ample supply of blank forms. Two pieces of paper contained merely a list of names, phone numbers and addresses in different handwritings. There also were copies of books and magazines, also bearing prices and apparently for sale.

Inspector Cochran testified that to his knowledge, no one had ever been granted permission to solicit on post

office property. He read from a letter in which he set forth postal service policy regarding solicitation. "The Postal Service should *never* grant prior approval for an organization to distribute literature, solicit signatures, etc. on postal property."

DISCUSSION

Defendants raise three issues on appeal: (1) their First Amendment rights and their right to equal protection of the law were violated by the application of Section 232.1 against them; (2) the evidence was insufficient to sustain their convictions; and (3) the Maryland trespass statute is unconstitutionally vague.[1]

Constitutional Challenges to Section 232.1(h)

The Supreme Court has indicated that for purposes of analyzing whether restrictions on speech-related activity on publically owned property are constitutional, three categories of property must be differentiated: (1) property which has historically been devoted to assembly and debate, (2) property which the Government has chosen to open for the purpose of debate and (3) property which is not, either by tradition or designation, a forum for public debate. *See Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). Restrictions on speech-related activity on property falling within the third category are lawful "as long as the regulation on speech is reasonable and not an effort to suppress expres-

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[1] Defendants also contend that the physical evidence introduced against them was unlawfully seized for lack of probable cause. However, it is apparent that this contention is simply a different form of their contentions that Section 232.1(h) is unconstitutional and that the evidence was insufficient to sustain their convictions.

sion merely because public officials oppose the speaker's views." *Id.* at 46. Two Courts of Appeal have, in analyzing Section 232.1(h), held that sidewalks providing access to post offices are non-public forums under the *Perry*-analysis.[2] *See United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986), *United States v. Bjerke*, 796 F.2d 643 (3rd Cir. 1986). Although the Fourth Circuit has not decided the issue, it has held that a school parking lot was neither by tradition nor by designation a forum for public communication. *See Grattan v. Board of School Commissioners*, 805 F.2d 1160 (4th Cir. 1986). On the basis of these authorities, this Court finds Section 232.1(h) not to be in violation of the First Amendment.

Defendants' equal protection challenge is premised upon a provision in the regulation excepting from the non-solicitation prohibition solicitations made of federal employees "for contributions by recognized agencies as authorized by the Manual on Fundraising Within the Federal Service, issued by the Chairman of the U.S. Civil Service Commission under Executive Order 10927 of March 13, 1961. 39 C.F.R. 232.1(h)(1)(iii). The executive order in question, which was signed by President Kennedy on March 18, 1961, provided that the Chairman of the Civil Service Commission "shall make arrangements for . . . national voluntary health and welfare agencies . . . to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations." 26 Fed. Reg. 2383 (1961). There is a clear distinction between soliciting federal employees while they are at

[2] The Seventh Circuit has also upheld the constitutionality of Section 232.1(h). That Court, however, assumed that sidewalks providing access to post offices constitute a public forum and held that the regulation was a reasonable "manner" type of restriction on the exercise of free speech. *See National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717 (7th Cir. 1984).

work during the course of organized fund drives and solicitation of members of the general public when they approach the post office to conduct business. Thus, the exception made in the regulation is rationally based and does not render the regulation unconstitutional.

Sufficiency of the Evidence

Defendants argue that the evidence was not sufficient to sustain their convictions because it did not show beyond a reasonable doubt that they were conducting solicitations for money rather than simply making free distribution of literature. The contention is frivolous. The evidence included observations by the government witnesses that on the table at which defendants were working were subscription forms to a publication of the National Democratic Policy Committee, forms for donations to the same organization, on which prices were marked. Charge card slips were also on the table, and the officials who arrested the defendants also seized one charge slip that had been filled out in the amount of $25.00. This evidence was fully sufficient to sustain the Magistrate's finding that defendants were making solicitations for money.

Defendants further argue in connection with the trespass charge that since the evidence indicated that there was sufficient room available for one person to walk in front of the table, there was no basis for the Magistrate to find that defendants "act[ed] in a manner disruptive of and disturbing to the conduct of normal business." The evidence also showed, however, that the postmaster had to deal with 40 or 50 complaints regarding the defendants' behavior. This evidence circumstantially showed that postal customers were being inconvenienced and directly proved that the postmaster himself had to attend to complaints rather than engaging in his normal business.

Alleged Vagueness of the Maryland Trespass Statute

As indicated above, in sentencing the defendants Magistrate Kenkel considered the charge under the Maryland trespass statute to be merged into the two counts under the code of federal regulations. Therefore, defendants' argument concerning the alleged unconstitutional vagueness of the Maryland statute is moot. In any event, the argument is unfounded. The term "disruptive of" and "disturbing to" which defendants claim are unconstitutionally vague, are of plain and simple meaning and adequately describe the conduct which they cover.

For these reasons defendants' convictions are affirmed.

Date: June 23, 1987

/s/ J. FREDERICK MOTZ
J. Frederick Motz
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5107

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

MARSHA B. KOKINDA, ET AL.

CHRISTIAN ADVOCATES SERVING EVANGELISM, ET AL.,
AMICUS CURIAE

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

[Filed Apr. 14, 1989]

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this court.

On the question of rehearing before the panel, Judge Widener voted to rehear the case. Judge Murnaghan and Judge Wilkinson voted to deny rehearing.

In a requested poll of the court on the suggestion for rehearing in banc, Judges Russell, Widener, Hall, Chapman, and Wilkins voted to rehear the case in banc: and Chief Judge Ervin and Judges Winter, Phillips, Murnaghan, Sprouse, and Wilkinson voted to deny rehearing in banc.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson.

For the Court,

JOHN M. GREACEN
Clerk

DATED: April 14, 1989

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